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No. 06-11612

In the Supreme Court of the United States

HOMERO GONZALEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a federal criminal defendant must explicitly and personally waive his right to have an Article III judge preside over *voir dire*.

2. Whether the court of appeals erred when it reviewed petitioner's objection for plain error.

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OPINION BELOW

The opinion of the court of appeals (J.A. 24-33) is reported at 483 F.3d 390.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 2007. The petition for a writ of certiorari was filed on May 24, 2007, and was granted on September 25, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of conspiracy to possess more than 1,000 kilograms of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(b)(1)(A) and 846, and

four counts of aiding and abetting the possession of more than 100 kilograms of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(B) and 18 U.S.C. 2. He was sentenced to 190 months of imprisonment, to be followed by five years of supervised release. Gov't C.A. Br. 4. The court of appeals affirmed. J.A 24-33.

1. Petitioner was a high-level member of a narcotics trafficking organization based in Laredo, Texas, that was responsible for the transportation of thousands of kilograms of marijuana from Mexico to various destinations in the United States. Drugs from Mexico were delivered to warehouses in Laredo, where they were loaded onto trailers with commercial products for transportation to points north. Petitioner and others were responsible for preparing one warehouse to receive the marijuana loads and arranging for the marijuana to be loaded onto trailers and transported out. Petitioner helped to traffic more than 2,600 kilograms of marijuana. Presentence Investigation Report ¶¶ 8-35.

2. A federal grand jury in the United States District Court for the Southern District of Texas charged petitioner with conspiracy and aiding and abetting offenses. His initial appearance, detention hearing, and arraignment took place before United States Magistrate Judge Adriana Arce-Flores. Petitioner pleaded not guilty and elected to be tried by a jury. United States District Court Judge George P. Kazen handled four pretrial conferences. Gov't C.A. Br. 2-3.

On January 21, 2005, petitioner and his counsel appeared before Magistrate Judge Arce-Flores for jury selection. At the beginning of the process, the magistrate judge called the attorneys to the bench and asked both parties "if they are going to consent to having the

United States Magistrate Judge proceed in assisting in the jury selection of this case." J.A. 16. Counsel for the government responded: "Yes, we are, your Honor." *Ibid.* Petitioner's counsel also responded: "Yes, your Honor, we are." *Ibid.* The magistrate judge then stated: "The parties have agreed through consent that this Court will be assisting through the process of jury selection." *Ibid.* The magistrate judge did not ask petitioner directly whether he consented to having a magistrate judge perform jury selection, and petitioner did not execute a written consent. *Ibid.*

The magistrate judge asked whether petitioner required the assistance of a translator "at this time." J.A. 16. The record shows that a translator was present in court. J.A. 15. Petitioner's counsel responded: "Yes he does, your Honor." J.A. 16. After a pause in the proceedings, the magistrate judge then introduced herself: "I'm the United States Magistrate Judge, Adriana Arce-Flores, and I'm going to be conducting today's jury selection process." J.A. 17.[1]

Voir dire proceeded without incident or objection by petitioner. The magistrate judge provided the parties and venire members with a detailed explanation of the jury selection process. She permitted the parties to make statements to the venire members and to frame and ask their own series of questions. The magistrate judge also questioned venire members personally. All prospective jurors excused for cause were excused ei-

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[1] Because the record shows no further pause in the proceedings from the time the magistrate judge introduced herself to the jury panel until individual questioning of panel members commenced, the natural inference is that petitioner had the assistance of an interpreter at the time the magistrate judge introduced herself and announced that she would be conducting the jury selection process.

ther at defense counsel's request or without objection by defense counsel. Gov't C.A. Br. 7-8; J.A. 17-23; 1/21/05 Tr. 10-11, 13-15, 63-64, 71.

3. United States District Court Judge Adrian G. Duplantier presided over petitioner's trial. Petitioner made no objection to the magistrate judge's having conducted *voir dire* and did not ask the district judge to review any ruling or other action taken by the magistrate judge. The jury found petitioner guilty of all counts. J.A. 26. He was sentenced to 190 months of imprisonment, to be followed by five years of supervised release. Gov't C.A. Br. 4.

4. The court of appeals affirmed, rejecting petitioner's claim that the district court erred in delegating *voir dire* to a magistrate judge without petitioner's express personal consent. J.A. 24-33. Because petitioner had failed to object to the delegation before the district court, the court of appeals reviewed for plain error. J.A. 26. The court noted, however, that it found petitioner's argument unpersuasive even "under a less stringent standard." J.A. 31.

The court of appeals held counsel may consent to have a magistrate judge preside over *voir dire*. J.A. 27-29. It noted that, under this Court's decision in *Peretz* v. *United States*, 501 U.S. 923, 940 (1991), jury selection may be delegated to a magistrate judge in the absence of an objection by the defendant. J.A. 27. The court reasoned that "[t]he fact pattern in *Peretz*, in which the delegation was found to be permissible, is almost identical to that in the instant case," and it concluded that *Peretz* contains "no indication" that this Court found "the absence of specific consent by the defendant to be a dispositive, or even relevant consideration." J.A. 31.

The court of appeals acknowledged (J.A. 31-32) that one appellate decision had reached the opposite conclusion, see *United States* v. *Maragh*, 174 F.3d 1202 (11th Cir.), modified and petition for reh'g denied, 189 F.3d 1315 (11th Cir. 1999) (per curiam), and observed that the debate among other courts of appeals "appears to turn on whether affirmative consent is required at all, not on what form this consent must take." J.A. 32. The court declined to follow *Maragh*, noting that "[w]hat suffices for a waiver depends on the nature of the right at issue," *ibid.* (quoting *New York* v. *Hill*, 528 U.S. 110, 114 (2000)), and that the right to have an Article III judge conduct *voir dire* is even more "limited" than other rights that can be waived by counsel, J.A. 32. Having determined that the right to have an Article III judge preside at *voir dire* is not so fundamental that it must be waived personally, the court of appeals found no error and affirmed the judgment of the district court. J.A. 33.

SUMMARY OF ARGUMENT

Neither the Federal Magistrates Act nor the Constitution requires that a defendant provide an explicit and personal waiver of the right to have an Article III judge preside over *voir dire* in a criminal trial. An expression of consent by counsel is all that is required to satisfy the statute, the Constitution, and this Court's decisions. Even if there were error, petitioner's claim would be reviewable only for plain error under Rule 52(b) of the Federal Rules of Criminal Procedure because of his failure to object in the trial court. Petitioner cannot show that his forfeited claim implicates any error, let alone error that is "obvious," affects his substantial rights, or seriously affects the fairness, integrity, or public reputation of judicial proceedings.

I. A. The Federal Magistrates Act, 28 U.S.C. 636(b)(3), permits a magistrate judge to be assigned "such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. 636(b)(3). In *Gomez* v. *United States*, 490 U.S. 858 (1989), this Court held that Section 636(b)(3) does not permit a magistrate judge to supervise *voir dire* over the defendant's objection. The Court subsequently held in *Peretz* v. *United States*, 501 U.S. 923 (1991), that Section 636(b)(3) authorizes the magistrate judge to preside over *voir dire* with the parties' consent. Both of those decisions assumed, without deciding, that a defendant has a constitutional right to have an Article III judge preside over *voir dire*. *Id.* at 929.

B. 1. The reasoning of *Peretz* forecloses the view that a defendant must personally and explicitly waive his right to have an Article III judge supervise jury selection. The defendant in *Peretz* did not execute an explicit and personal consent to the magistrate role, and the Court did not adopt the view of the three dissenting Justices who would have held that personal, written consent was required. 501 U.S. at 947 n.6 (Marshall, J., dissenting). Moreover, the Court in *Peretz* confined *Gomez* to cases in which a defendant objects to the magistrate judge's role in jury selection and held that, absent such an objection, the defendant has no right under the Constitution or the Federal Magistrates Act to have an Article III judge conduct *voir dire*. *Id.* at 928, 933-935, 936, 937, 940. *A fortiori*, there is no error where defense counsel expressly consents to have the magistrate judge preside over *voir dire*.

2. Even if *Peretz* were thought to leave the question open, this Court's precedents make clear that a requirement of an explicit and personal waiver by the defendant

is unwarranted. Such a requirement is limited to those fundamental rights, such as the right to plead not guilty and the right to counsel, that have such sweeping implications for the accused that he alone must knowingly and intelligently relinquish his rights. For less fundamentally important rights, defense counsel speaks for the defendant and is entrusted to make tactical and strategic decisions on the defendant's behalf.

The decision whether to consent to have a magistrate judge or an Article III judge preside over *voir dire* is a strategic decision within the realm of counsel's expertise. Counsel is uniquely suited to determine whether a magistrate judge's style, practice, and procedures in supervising *voir dire* will advance his client's interest in picking a favorable jury in a particular case. Indeed, counsel is entrusted with critical decisions during *voir dire* such as when and whether to strike jurors for cause or to exercise peremptory challenges and how to question prospective jurors when permitted by the judge. It would be incongruous to cede those decisions to counsel but hold that only the defendant can waive an Article III judge at jury selection.

3. Nor is it necessary for counsel to represent to the court that he has his client's concurrence when he makes a strategic decision that the magistrate judge, rather than an Article III judge, will advance the defendant's interests in securing a favorable jury. The nature of the attorney-client relationship presumes that counsel has discussed overarching defense strategy with his client and that counsel will otherwise zealously represent his client as counsel deems best. See, *e.g.*, *Florida* v. *Nixon*, 543 U.S. 175, 187-189 (2004).

4. There is no basis for requiring courts to follow the personal, written consent requirements of 18 U.S.C.

3401(b), which apply before a magistrate judge may conduct federal misdemeanor trials. The Court in *Peretz* did not adopt those requirements despite the urging of three dissenting Justices. 501 U.S. at 947 n.6 (Marshall, J., dissenting). Congress deemed those procedures appropriate when the magistrate judge is to preside over the entire trial and sentencing proceeding, and to enter judgment in the case. There is no reason to think that Congress would have wanted to impose a similar requirement for counsel's strategic decision to have the magistrate judge preside over only one limited part of a felony proceeding—jury selection.

II. A. Because petitioner did not object at trial to the role of the magistrate judge during jury selection, the court of appeals correctly reviewed petitioner's objection for plain error under Rule 52(b) of the Federal Rules of Criminal Procedure. None of the four justifications that petitioner advances for ignoring application of plain-error review has merit. First, the parties had the opportunity to object to the magistrate judge's role within the meaning of Federal Rule of Criminal Procedure 51(b). Second, plain-error review applies to a claim that a represented defendant did not validly waive his personal rights. *United States* v. *Vonn*, 535 U.S. 55 (2002). Third, plain-error review applies even though, had petitioner timely objected to the magistrate judge's role, an Article III judge would have presided over jury selection; indeed, the whole point of requiring parties to make a contemporaneous objection is to permit the trial court to cure the error and remove the issue as a basis for appeal. Fourth, Rule 52(b) applies to claims that are procedurally defaulted in federal criminal cases regardless of this Court's precedents concerning review of

state court judgments. *Johnson* v. *United States*, 520 U.S. 461, 466 (1997).

B. Petitioner has not established that he entitled to a new trial under plain-error review. Even assuming that it was error to delegate jury selection to the magistrate judge with defense counsel's consent, but without the defendant's explicit and personal consent, relief would be unwarranted in this case. The error was far from "plain," Fed. R. Crim. P. 52(b), given this Court's reasoning in *Peretz* that a defendant has no right to an Article III judge during *voir dire* absent a demand for one, and given that a majority of the courts of appeals had held that a magistrate judge could preside over *voir dire* with defense counsel's consent.

Nor has petitioner shown that any error affected petitioner's "substantial rights." Fed. R. Crim. P. 52(b). Although *Gomez* held that harmless-error analysis does not apply when a magistrate judge supervises jury selection over a defendant's objection, the alleged error is not equivalent to *Gomez*. In contrast to the objection by counsel in *Gomez*, petitioner's counsel embraced the magistrate judge's offer to conduct *voir dire*, presumably because he thought such action would *benefit* the defense. There is no reason to assume that petitioner disagreed. In those circumstances, the relevant inquiry does not focus on what would have happened if the magistrate judge had not conducted *voir dire*, but rather on whether the magistrate judge would have conducted *voir dire* if petitioner had been asked for his personal consent.

In all events, any error did not seriously affect the fairness, integrity or public reputation of judicial proceedings. Jury selection proceeded in this case without incident, and the magistrate judge presided over *voir*

dire only after obtaining defense counsel's explicit consent on the issue. To provide relief in this case would give defendants the incentive to inject error into the proceedings, thereby giving them the unjustified "luxury of waiting for the outcome before denying the magistrate judge's authority." *Roell* v. *Withrow*, 538 U.S. 580, 590 (2003).

ARGUMENT

I. A FEDERAL CRIMINAL DEFENDANT NEED NOT EXPLICITLY AND PERSONALLY CONSENT TO HAVE A MAGISTRATE JUDGE PRESIDE OVER *VOIR DIRE*

A. The Federal Magistrates Act Authorizes A District Court To Delegate Jury Selection To A Magistrate If The Defendant Consents To That Delegation

The Federal Magistrates Act, 28 U.S.C. 636, outlines the powers and duties of magistrate judges. Section 636(b)(1)(A) provides that "a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court."[2] Magistrate judges may also conduct jury or nonjury civil matters, or serve as a special master in a civil case without regard to the limitations of Rule 53(b) of the Federal Rules of Civil Procedure, "upon consent of the parties," 28 U.S.C. 636(b)(2) and (c)(1), and may conduct misdemeanor trials, with or without a jury, upon "express[] consent" in

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[2] While Section 636(b)(1)(A) excepts from such delegable authority a variety of pretrial duties (such as motions for injunctive relief, for judgment on the pleadings, to dismiss or quash an indictment, and to suppress evidence in a criminal case), Section 636(b)(1)(B) permits a judge to designate a magistrate judge to "conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition" of such excepted motions.

writing or orally on the record, 28 U.S.C. 636(a)(3); 18 U.S.C. 3401(b). Section 636(b)(3) provides that "[a] magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States."

In *Gomez* v. *United States*, 490 U.S. 858 (1989), this Court held that the "additional duties" that may be delegated to a magistrate judge under Section 636(b)(3) do not encompass the selection of a jury in a felony trial over the defendant's objection. *Id.* at 872. The Court's conclusion was influenced by the "substantial question whether a defendant has a constitutional right to demand that an Article III judge preside at every critical stage of a felony trial." *Peretz* v. *United States*, 501 U.S. 923, 929 (1991). That question led the Court to look for clear evidence that Congress intended the general grant of authority in Section 636(b)(3) to authorize a procedure that "deprived a defendant of an important privilege, if not a right." *Id.* at 930.

The Court in *Gomez* found no such intent, explaining that the Act's "carefully defined grant of authority [to magistrates] to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial." 490 U.S. at 872. In addition, the Court noted that the Act contains no provisions for court review of a magistrate judge's decision during jury selection; the Court concluded that "it is unlikely that [Congress] intended to allow a magistrate to conduct jury selection without procedural guidance or judicial review." *Id.* at 873. The Court also held that the delegation of *voir dire* to a magistrate judge, "despite the defendant's objection," cannot be harmless error. *Id.* at 876.

Two years later, in *Peretz*, the Court held that the Act permits a magistrate judge to supervise *voir dire* with the consent of the parties. In *Peretz*, the district court judge asked at a pretrial conference whether there was "[a]ny objection to picking the jury before a magistrate." 501 U.S. at 925. The defendant's counsel responded: "I would love the opportunity." *Ibid.* Before jury selection began, the magistrate judge again requested "assurances from counsel for [the defendant] and from counsel for his codefendant that she had their clients' consent to proceed with the jury selection." *Ibid.* Counsel for the defendant responded: "Yes, your Honor." *Id.* at 925 n.2.

The Court held that "supervision of *voir dire* in a felony proceeding is an additional duty that may be delegated to a magistrate under 28 U.S.C. § 636(b)(3) if the litigants consent." *Peretz*, 501 U.S. at 935. The Court noted that the Act allows the district court with the parties' consent to delegate to a magistrate judge the supervision of entire civil and misdemeanor trials. Those duties, the Court concluded, were "comparable in responsibility and importance to presiding over *voir dire* at a felony trial." *Id.* at 933. The Court further explained that its reading of the Act's "additional duties" clause "strikes the balance Congress intended between the interests of the criminal defendant and the policies that undergird the Federal Magistrates Act," and will allow the courts "to 'continue innovative experimentations' in the use of magistrates to improve the efficient administration of the courts' dockets." *Id.* at 933-934 (quoting H.R. Rep. No. 1609, 94th Cong., 2d Sess. 12 (1976)).

The Court acknowledged that Article III, Section 1 "serves both to protect 'the role of the independent

judiciary within the constitutional scheme of tripartite government' * * * and to safeguard litigants' 'right to have claims decided before judges who are free from potential domination by other branches of government.'" *Peretz*, 501 U.S. at 929 n.6 (quoting *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985), and *United States* v. *Will*, 449 U.S. 200, 218 (1980)). The Court explained, however, that because the ultimate decision whether to empanel the jury remains in the hands of the district court judge, the right to have an Article III judge preside over jury selection does not fall within any category of "structural protections" that litigants cannot waive: "Because the entire process takes place under the district court's total control and jurisdiction, there is no danger that use of the magistrate involves a congressional attempt[] to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating constitutional courts." *Id.* at 938 (internal quotation marks and citations omitted).

B. Defense Counsel May Consent On Behalf Of A Defendant To Have A Magistrate Judge Preside Over *Voir Dire*

1. *Under the Court's reasoning in* Peretz, *a defendant may consent through counsel to have a magistrate judge preside over* voir dire

The reasoning of this Court's decision in *Peretz* refutes the contention that a defendant must personally and explicitly waive his right to have an Article III judge preside over *voir dire*. In holding that a magistrate judge could supervise *voir dire* with the parties' consent, the Court found it "critical[]" in distinguishing *Gomez* that the defendant's "*counsel*, rather than objecting to the Magistrate's role, affirmatively welcomed it." *Peretz*, 501 U.S. at 932 (emphasis added). As the

court of appeals recognized, "there is no indication [in *Peretz*] that the Court found the absence of specific consent *by the defendant* to be a dispositive, or even relevant consideration." J.A. 31 (emphasis added); see *United States* v. *Gamba*, 483 F.3d 942, 948-949 (9th Cir. 2007) (observing that "there is no express indication in *Peretz* that the defendant ever *personally* consented to the magistrate's presence" and that the Court "by no means required it"), petition for cert. pending, No. 07-6054 (filed Aug. 17, 2007). Indeed, the Court did not adopt the view of three dissenting Justices that counsel's consent was insufficient because the defendant had not given personal written consent to the magistrate judge's role. *Peretz*, 501 U.S. at 947 (Marshall, J., dissenting). Similarly, the Court expressed its "confiden[ce] * * * that *defense counsel* can sensibly balance [the relevant] considerations in deciding whether to object to a magistrate's supervision of *voir dire*." *Id.* at 935 n.12 (emphasis added).

Peretz also makes clear that neither the Constitution nor the statute mandates that a defendant personally consent to a magistrate judge's presiding over *voir dire*. Although the facts in *Peretz* involved the consent of counsel, the Court more broadly concluded that, absent a specific demand by the defense that an Article III judge preside over jury selection, neither the Constitution nor the Act is offended when a magistrate judge conducts *voir dire*. The decision repeatedly stated that a defendant has no constitutional right to have an Article III judge supervise *voir dire* absent an objection or demand by the defense. 501 U.S. at 936 ("a defendant has no constitutional right to have an Article III judge preside at jury selection *if the defendant has raised no objection to the judge's absence*") (emphasis added); *id.*

at 937 ("Just as the Constitution affords no protection to a defendant who waives * * * fundamental rights, so it gives no assistance *to a defendant who fails to demand the presence of an Article III judge* at the selection of his jury.") (emphasis added); *id.* at 940 (allowing a magistrate judge to conduct *voir dire* in a felony trial "when the defendant raises no objection" fully accords with the Federal Magistrates Act).[3]

Petitioner argues that those conclusions must be read in light of the fact that the counsel in *Peretz* represented that his client agreed to have a magistrate judge preside over *voir dire* and in any event conflict with the principle that a right can be waived only knowingly and intelligently. Br. 22-24. The quoted statements, however, were critical to the Court's disposition of the case. The Court explained that it had no occasion to decide whether Peretz had waived his claim of error, because it found no constitutional or statutory error at all. Instead, the Court stated, "[w]e agree with the majority of Circuit Judges who have considered this issue, both before and after our decision in *Gomez*, that permitting a magistrate to conduct the *voir dire* in a felony trial *when the defendant raises no objection* is entirely faithful to

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[3] In other contexts as well, this Court has held that a right may be lost if not affirmatively asserted by the defendant. See, *e.g.*, *United States* v. *Gagnon*, 470 U.S. 522, 528-529 (1985) (per curiam) (no right to be present at all stages of a criminal trial absent a defense objection); *Levine* v. *United States*, 362 U.S. 610, 619 (1960) (no right to public trial absent a defense request for one); *Estelle* v. *Williams*, 425 U.S. 501, 512-513 (1974) ("[A]lthough the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes, the failure to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation."); *Peretz*, 501 U.S. at 936 (citing cases).

the congressional purpose in enacting and amending the Federal Magistrates Act." *Peretz*, 501 U.S. at 940 (emphasis added).

Similarly, the Court in *Peretz* elsewhere reiterated that there is no error under *Gomez* in the absence of compulsion, *i.e.*, unless the defendant objects to having a magistrate judge supervise jury selection and his objection is rejected. 501 U.S. at 933 (endorsing the view of those courts of appeals that had "concluded that the rationale of [*Gomez*] does not apply if *the defendant has not objected* to the magistrate's conduct of the *voir dire*.") (emphasis added); *id.* at 928 (observing that before *Gomez*, "courts had uniformly rejected challenges to a magistrate's authority to conduct the *voir dire* when *no objection to his performance of the duty had been raised* in the trial court.") (emphasis added); *id.* at 934-935 ("Where * * * the defendant is *indifferent* as to whether a magistrate or a judge should preside, then it makes little sense to deny the district court the opportunity to delegate that function to a magistrate, particularly if such a delegation sensibly advances the court's interest in the efficient regulation of its docket.") (quoting *Government of the V.I.* v. *Williams*, 892 F.2d 305, 311 (3d Cir. 1989), cert. denied, 495 U.S. 949 (1990)) (emphasis added). And three dissenting Justices likewise viewed the majority's opinion as "creating authority for magistrates to preside over a 'critical stage' of the felony trial * * * *merely because a defendant fails to request a judge*." *Id.* at 948 (Marshall, J., dissenting) (quoting *Gomez*, 490 U.S. at 873) (emphasis added).

Petitioner thus errs in arguing that the Federal Magistrates Act must be read to require the defendant's explicit and personal consent in order to avoid the "serious constitutional question" that would arise if counsel on

behalf of the defense could consent to *voir dire* by a magistrate judge. Pet. Br. 13-21, 31-32; see NACDL Amicus Br. 8-13, 34. The only constitutional question left open after *Gomez* and *Peretz* is whether "a defendant in a criminal trial has a constitutional right to demand the presence of an Article III judge at *voir dire*." 501 U.S. at 936; accord *id.* at 929. Even assuming he has such a right, this Court already has concluded that a defendant has neither a constitutional nor statutory right to have an Article III judge conduct *voir dire* absent his demand for one (by objecting to the magistrate judge's presiding). *A fortiori*, there is no error at all when defense counsel affirmatively consents to having a magistrate judge conduct jury selection.

2. The decision whether to have an Article III judge or a magistrate judge conduct* voir dire *is a strategic decision entrusted to counsel

Even if this Court's reasoning in *Peretz* does not foreclose the argument that the defendant must explicitly and personally consent to have a magistrate conduct *voir dire*, this Court should conclude that counsel's consent is sufficient as a matter of first principles. The conditions under which a right may be waived depend on the nature of the right itself. *New York* v. *Hill*, 528 U.S. 110, 114 (2000). "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *United States* v. *Olano*, 507 U.S. 725, 733 (1993).

This Court has recognized only a limited class of fundamental rights that "are of such moment" for the ac-

cused that the defendant must give personal and informed consent before a waiver is valid. *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004); *Hill*, 528 U.S. at 114 ("For certain fundamental rights, the defendant must personally make an informed waiver."). Those rights include the right to plead not guilty and go to trial, *Boykin* v. *Alabama*, 395 U.S. 238 (1969), the right to a jury, *Taylor* v. *Illinois*, 484 U.S. 400, 418 n.24 (1988); *Adams* v. *United States ex rel. McCann*, 317 U.S. 269 (1942), and the right to counsel, *Faretta* v. *California*, 422 U.S. 806 (1975); see *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983). For certain other important rights, such as the right to appeal and the right to testify, the accused retains control over the ultimate decision, *ibid.*, but the Constitution does not require an on-the-record explicit and personal waiver.[4]

Outside of these narrowly confined contexts in which a personal waiver is demanded, a represented defendant generally speaks through counsel who, as the defendant's agent, has the power to make decisions that bind the defendant. Absent the ineffective assistance of counsel, "the attorney is the [defendant's] agent when acting, or failing to act, in furtherance of the litigation, and the [defendant] must 'bear the risk of attorney error.'" *Coleman* v. *Thompson*, 501 U.S. 722, 753 (1991) (quoting *Murray* v. *Carter*, 477 U.S. 478, 488 (1986)); accord *Link* v. *Wabash R.R.*, 370 U.S. 626, 634 (1962) (observing that our judicial system is based on "representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have

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[4] See *Roe* v. *Flores-Ortega*, 528 U.S. 470, 476-481 (2000) (examining counsel's failure to file a notice of appeal under ineffective assistance standards); p. 28, *infra* (defendant can waive the right to testify without any personal colloquy with the trial judge).

'notice of all facts, notice of which can be charged upon the attorney'") (quoting *Smith* v. *Ayer*, 101 U.S. 320, 326 (1880)).

Petitioner thus errs in asserting that the concept of a waiver inherently requires, "at minimum," a knowing and intelligent decision *by the accused*. Br. 31. Counsel is not constitutionally required to secure his client's personal informed consent before making the numerous strategic and tactical decisions that effect a binding waiver of his client's rights. "Almost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial." *Schneckcloth* v. *Bustamonte*, 412 U.S. 218, 237 (1973). This Court therefore has not required a "showing of conscious surrender of a known right * * * with respect to strategic and tactical decisions, even those with constitutional implications, by a counseled accused." *Estelle* v. *Williams*, 425 U.S. 501, 508 n.3 (1976); see *Olano*, 507 U.S. at 733.

While an attorney "has a duty to consult with the client regarding important decisions, including questions of overarching defense strategy," that obligation "does not require counsel to obtain the defendant's consent to every tactical decision." *Nixon*, 543 U.S. at 187 (internal quotation marks and citations omitted); *Faretta*, 422 U.S. at 820 ("law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas").

In *Taylor*, the Court summarized and endorsed those principles in rejecting a Compulsory Process claim that the trial court had acted improperly in excluding a defense witness as a sanction for counsel's violation of discovery rules. In dismissing the argument that "it is un-

fair to visit the sins of the lawyer upon his client," 484 U.S. at 416, the Court explained:

> [T]he lawyer has—and must have—full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval. * * * Putting to one side the exceptional cases in which counsel is ineffective, the client must accept the consequences of the lawyer's decision to forgo cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial.

Id. at 418; see *Nixon*, 543 U.S. at 187-189 (counsel, after consultation with client, may concede guilt in capital sentencing proceeding without defendant's explicit and personal consent); *Hill*, 528 U.S. at 115 (counsel is entrusted to consent to a trial date beyond time limit required by the Interstate Agreement on Detainers Act, 18 U.S.C. App. 1 *et seq.* at 1520 (2000)); *Barnes*, 463 U.S. at 751 (counsel is entrusted to determine which issues will be pressed on appeal); accord *Wainwright* v. *Sykes*, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring). In short, unless counsel is shown to have acted ineffectively, "counsel's word on such matters is the last." *Hill*, 528 U.S. at 115.[5]

The decision of which neutral judicial officer should preside over one stage of the criminal proceeding—the selection of the jury—is not the sort of fundamental de-

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[5] Petitioner has not alleged that his counsel, in consenting to the magistrate judge's role, provided ineffective assistance of counsel under *Strickland* v. *Washington*, 466 U.S. 668 (1984), and any such claim would ordinarily be raised on collateral review, *Massaro* v. *United States*, 538 U.S. 500, 504-509 (2003).

cision that the defendant alone must make and that must be protected by having the court personally address the defendant. That decision does not have the same pervasive impact on the defendant as the decisions to forego counsel, to plead guilty, or to have a jury decide the defendant's factual guilt or innocence. Those decisions have profound consequences for the defendant and may fundamentally alter his fate. The same cannot be said of the decision to permit a magistrate judge to preside over *voir dire*. Magistrate judges are not inherently unfit to preside over jury selection and nothing suggests that a jury chosen by a magistrate judge is likely to be less fair than one selected by a district court. On the contrary, the Court has noted that the Federal Magistrates Act "evinces a congressional belief that magistrates are well qualified to handle matters of similar importance to jury selection." *Peretz*, 501 U.S. at 935; *Gomez*, 490 U.S. at 869 ("congressional concerns regarding magistrates' abilities had decreased" since the first version of the Federal Magistrates Act was enacted).

Significantly, the strategic and tactical considerations that inform the decision whether to agree to have a magistrate judge conduct *voir dire* in a felony criminal case are peculiarly within the realm of counsel's expertise, and are matters as to which the defendant ordinarily would be expected to defer to counsel. *Peretz*, 501 U.S. at 935 n.12 (observing that a magistrate judge's performance of jury selection "may be difficult for a judge to review with infallible accuracy" but expressing confidence "that *defense counsel* can sensibly balance these considerations against other concerns in deciding whether to object to a magistrate's supervision of *voir dire*") (emphasis added); cf. *Gamba*, 483 F.3d at 947-948 (holding that counsel's decision to consent to having a

magistrate judge preside over closing argument was a technical and strategic legal decision entrusted to counsel).

For a number of tactical reasons, counsel may prefer to have a magistrate judge, rather than an Article III judge, conduct *voir dire*. He may know that a particular magistrate judge permits defense counsel to address or question prospective jurors, while the district judge may not. See J.A. 20 (magistrate judge's advising the parties that "I let the attorneys handle the voir dire."). Counsel may know that the magistrate judge would be likely to conduct a more thorough inquiry than a district judge, who might be diverted by other matters, or that the magistrate judge's view of qualified jurors is more favorable to the defendant than the district judge's view, and thus that he might be more willing than a district judge to grant for-cause challenges. And in this case, because petitioner may have had a favorable experience when he previously appeared before Magistrate Judge Arce-Flores, p. 2, *supra*, counsel may have formed the judgment that she would effectively preside over *voir dire*. Indeed, in light of the undisputed reality that magistrate judges may handle *voir dire*, the choice between which neutral judicial officer will conduct *voir dire* is analogous to a choice whether to seek reassignment of a case to another judge and to the decision as the best forum for filing a civil case, which are classic matters for the attorney's judgment and as to which an insistence of a personal waiver would be wholly inapposite.

Those strategic questions are quintessentially ones for defense counsel to make, based on matters lying squarely within his area of expertise. They are questions as to which a defendant would almost certainly defer to the judgment of counsel. And, indeed, counsel

could reasonably conclude that an exposition to his client about his right to demand an Article III judge would not fruitfully advance the decision whether or not to allow the magistrate judge to conduct *voir dire*. *ABA Standards for Criminal Justice: Prosecution Function and Defense Function* standard 4-5.2 commentary at 202 (3d ed. 1993) ("Many of the rights of an accused, including constitutional rights, are such that only trained experts can comprehend their full significance, and any explanation to any but the most sophisticated client would be futile.").

Petitioner errs in asserting (Br. 18-19) that, in light of the importance of jury selection in a felony criminal trial, this Court should preclude counsel from consenting to a magistrate judge's presiding over *voir dire* on behalf of his client. Despite the importance of jury selection, counsel routinely decide during *voir dire* whether to exercise or waive a myriad of rights that directly affect the composition of the jury and its initial views of the case. The decisions whether and when to exercise peremptory strikes and to challenge jurors for cause are tactical and strategic decisions that are "entrusted to counsel rather than to defendants personally." *United States* v. *Boyd*, 86 F.3d 719, 723 (7th Cir. 1996), cert. denied, 520 U.S. 1231 (1997); see *Hughes* v. *United States*, 258 F.3d 453, 457 (6th Cir. 2001); *Nguyen* v. *Reynolds*, 131 F.3d 1340, 1349 (10th Cir. 1997), cert. denied, 525 U.S. 852 (1998); *Teague* v. *Scott*, 60 F.3d 1167, 1172 (5th Cir. 1995); cf. *Wainwright* v. *Witt*, 469 U.S. 412 (1985) (defendant can forfeit, without personal consent, the right not to have members of the venire excluded because of their attitudes toward capital punishment).

A court has no *sua sponte* duty to question the defendant to ensure that he agrees with counsel's decisions on whether and how to question certain jurors as to their views. *McKaskle* v. *Wiggins*, 465 U.S. 168, 183 (1984) (defendant has no constitutional right to a "hybrid" defense team, consisting of himself and his lawyer making decisions by turns). Indeed, it would be an inappropriate intrusion into the attorney-client relationship for the judge to invite open discussion about whether a defendant concurs with his counsel's jury selection decisions and *voir dire* tactics. In view of that predominant role of counsel in jury selection tactics, it would make little sense to deny trial counsel the authority to decide which neutral judicial officer would best advance the defense interests in the supervision of *voir dire*.[6]

Petitioner argues (Br. 28-30) that this Court in *CFTC* v. *Schor*, 478 U.S. 833 (1986), equated the right to an Article III judge with the right to jury trial or the right to plead not guilty when the Court stated "as a personal right, Article III's guarantee of an impartial

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[6] Petitioner's amici argue that counsel's consent alone should be insufficient because they surmise that counsel will have improper incentives to consent to the magistrate judge's role. Amici suggest that counsel may want to curry favor with both the magistrate judge and the referring trial judge and that the magistrate judge may conduct jury selection in a way that saves counsel time and money. NACDL Amicus Br. 31-33; Houston Inst. Amicus Br. 25-26. There is no basis, however, for assuming that judges would harbor more ill-will towards counsel who object to the magistrate judge's role on the defendant's behalf than they would towards counsel whose client personally objects to the magistrate judge's role, or, for that matter, towards counsel who object to any other decision or request by a judge. In any event, there is no basis for fashioning a constitutional rule based on speculation that counsel would subsume his client's interests in favor of counsel's personal or pecuniary interests.

and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." *Id.* at 848-849. To the extent that the Court equated the rights it mentioned, *Schor* did not involve the right to have jury selection conducted by an Article III judge but rather a civil litigant's right to an adjudication by an Article III tribunal instead of the Commodities Futures Trading Commission (CFTC). In any event, the fact that a right is "personal" does not mean, as suggested by petitioner (Br. 29), that it requires an explicit and personal waiver by a party; rather it means the right is subject to waiver in the first place (as opposed to a non-waivable structural guaranty). See, *e.g.*, *Hill*, 528 U.S. at 116-118. Finally, *Schor* itself did not require an explicit and personal waiver of Article III rights by the party, as the Court made clear that waiver could be expressed or implied by the party's actions in appearing before the CFTC. 478 U.S. at 849-850.

Similarly, the proposition that the right to have an Article III judge preside over *voir dire* involves "the procedures by which civil and criminal matters must be tried," *Schor*, 478 U.S. at 848-849, does not establish that the right can be waived only through the defendant's explicit and personal consent. A defendant must personally waive the right to plead not guilty, the right to a jury, and the right to counsel, not because those decisions affect the framework of the trial as such, but because they so profoundly affect *the defendant* himself that the Constitution demands that the right cannot be lost without his knowing and intelligent relinquishment. Only that profound personal effect—and not a structural error *vel non*—justifies an insistence on an express indication of waiver directly from the accused and deviation

from the normal rule that an attorney speaks for the client.

For instance, a violation of a right to a public trial is a "structural defect affecting the framework within which the trial proceeds" and is thus not subject to harmless-error analysis. *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991); *Waller* v. *Georgia*, 467 U.S. 39, 49 n.9 (1984). The right to a public trial, however, may be waived by the defendant short of his explicit and personal consent; failure to raise an objection alone is sufficient. *Peretz*, 501 U.S. at 936 (citing *Levine* v. *United States*, 362 U.S. 610, 619 (1960)); cf. note 3, *supra* (noting that lack of objection waives a defendant's right to be present during all stages of the trial and his right not to wear prison clothes at trial).

For similar reasons, petitioner mistakenly relies (Br. 30) on this Court's holding in *Gomez*, 490 U.S. at 876, that "a defendant's right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside" is a "basic" right that when infringed is not reviewed for harmlessness. As discussed, whether a right, if infringed, can be reviewed for prejudice does not necessarily dictate the circumstances under which the right may be waived. In any event, *Peretz* makes clear that the "holding in *Gomez* was narrow" and limited to the situation where the magistrate "'exceeds his jurisdiction' by selecting a jury '*despite the defendant's objection.*'" 501 U.S. at 927 (emphasis added) (quoting *Gomez*, 490 U.S. at 876).[7] If the Constitution "gives no

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[7] When the Court in *Gomez* stated that the magistrate judge "exceeds his jurisdiction" in presiding over jury selection over a defendant's objection, 490 U.S. at 876, the term "jurisdiction" was used "as a synonym for 'authority,' not in the technical sense involving subject matter jurisdiction." *Peretz*, 501 U.S. at 953 (Scalia, J., dissenting); see

assistance to a defendant who fails to demand the presence of an Article III judge at the selection of his jury," *id.* at 937, no error, much less a structural error, occurs when defense counsel expressly consents to the presence of the magistrate judge.

3. The record need not show that the defendant agreed with his counsel's actions

Petitioner argues (Br. 41-44) in the alternative that even if an explicit and personal waiver by the defendant is not required to cloak a magistrate judge with the authority to conduct *voir dire*, the record must at least be clear that the defendant understood his rights and agreed with his counsel's decision. Yet that hybrid form of waiver has no legal precedent and little to commend it as a matter of policy. As discussed, absent those rare situations in which the defendant's waiver must be explicit and personal, defense counsel is presumed to speak on behalf of his client. There is accordingly no need for the court *sua sponte* to inquire whether counsel has discussed the matter with the defendant and obtained his consent on the issue. Cf. *Nixon*, 543 U.S. at 187-189 (counsel was not ineffective in conceding his cli-

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United States v. *Wey*, 895 F.2d 429, 431 (7th Cir.), cert. denied, 497 U.S. 1029 (1990); *Kontrick* v. *Ryan*, 540 U.S. 443, 454 (2004) (noting that jurisdiction is a term of many meanings and has often been used loosely by the Court). The district court, which is the judicial body before which the indictment is pending and which alone enters judgment, indisputably has subject matter jurisdiction. See 18 U.S.C. 3231. That conclusion is compelled by the holding in *Peretz* that a magistrate judge has the authority to preside over *voir dire* with the parties' consent. Cf. *United States* v. *Cotton*, 535 U.S. 625, 630 (2002) ("[S]ubject-matter jurisdiction, because it involves the court's power to hear a case, can never be forfeited or waived.").

ent's guilt during capital penalty phase even absent the defendant's explicit and personal consent).

For instance, the lower courts generally have held that trial courts do not have to duty to ask whether the defendant has agreed to waive his right to testify, even though such a decision implicates concerns extending beyond mere trial strategy. See, *e.g.*, *United States* v. *Ortiz*, 82 F.3d 1066, 1069-1070 & n.8 (D.C. Cir. 1996) (citing decisions of the First, Third, Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits holding that trial courts do not need *sua sponte* to conduct an on-the-record colloquy about the defendant's waiver of his right to testify). "Although the ultimate decision whether to testify rests with the defendant," when a tactical decision is made not to have the defendant testify, the defendant's assent is presumed. *United States* v. *Joelson*, 7 F.3d 174, 177 (9th Cir.), cert. denied, 510 U.S. 1019 (1993); *United States* v. *Pennycooke*, 65 F.3d 9, 12 (3d Cir. 1995) ("In the right to testify cases * * * the defendant is represented by counsel throughout the trial, and the court is entitled to—indeed should—presume that the attorney and the client have discussed that right.").

"Barring any statements or actions from the defendant indicating disagreement with counsel or the desire to testify, the trial court is neither required to sua sponte address a silent defendant and inquire whether the defendant knowingly and intentionally waived the right to testify, nor ensure that the defendant has waived the right on the record." *United States* v. *Webber*, 208 F.3d 545, 551 (6th Cir. 2000); accord *Siciliano* v. *Vose*, 834 F.2d 29, 30 (1st Cir. 1987) (Breyer, J.). Similarly, counsel's consent in this case to the magistrate judge's role in jury selection was properly imputed to petitioner

without a further inquiry into whether petitioner agreed with counsel.

Petitioner also argues that requiring the record to reflect an informed waiver by the defendant would not disrupt the trial process because the decision whether to consent to a magistrate judge's role during *voir dire* would be made at a finite point only once in the proceeding. Br. 31, 39-41; NACDL Amicus Br. 5-6, 15-16. The same could be said, however, of the one-time waiver of the right to testify, or defense counsel's one-time waiver of an opportunity to question prospective jurors, but in those contexts the defendant's assent to counsel's actions is presumed. See pp. 23-24, 28, *supra*.

Moreover, the law presumes that defense counsel has his client's assent not merely to avoid disrupting the trial but also to avoid disrupting the attorney-client relationship. The very nature of that relationship in the criminal system justice system depends on the lawyer being able to act as the defendant's agent with full authority to make tactical decisions concerning the trial. A court's *sua sponte* inquiry into whether the client agrees with such decisions undermines that relationship, and does so without any overriding benefit to a defendant who lacks legal training and skill. *Boyd*, 86 F.3d at 723. For similar reasons, it is irrelevant that a requirement of explicit and personal consent would have the salutary effect of minimizing later inquiries into whether counsel provided ineffective assistance. Pet. Br. 41. The same could be said of *all* strategic decisions made by counsel during the trial, yet counsel's word is binding absent a showing that counsel's actions fell below constitutional norms.

4. There is no basis for importing into 28 U.S.C. 636(b)(3) the consent procedures under 18 U.S.C. 3401(b) for a magistrate judge to preside over a misdemeanor trial

Petitioner argues that, had Congress confronted the issue, it would have directed courts to follow the procedures that Congress specified for a defendant to consent to a magistrate judge's presiding over an entire federal misdemeanor trial. Pet. 32-39; see NACDL Amicus Br. 16-27, 30. Those procedures require the court to notify the defendant "that he has a right to trial, judgment, and sentencing by a district judge" and prevent the magistrate from trying the case unless the defendant, in writing or orally on the record, "expressly consents to be tried before the magistrate judge and expressly and specifically waives trial, judgment, and sentencing by a district judge." 18 U.S.C. 3401(b). That speculation is interesting, though debatable, but in all events provides no basis for applying the Section 3401(b) procedures in this quite different context.

Petitioner urges this Court to adopt those procedures in order to "avoid the serious constitutional question" of permitting defense counsel to consent to the magistrate judge's role in jury selection. Br. 33. As discussed, however, there is no serious constitutional question in this case because the magistrate judge did not conduct jury selection over petitioner's objection. See pp. 14-17, *supra*. And there is no other plausible basis for importing the Section 3401(b) requirements. Application of the consent requirements set forth in 18 U.S.C. 3401(b) was also specifically urged by the dissent in *Peretz*, 501 U.S. at 947 n.6 (Marshall, J., dissenting), but the Court did not see fit to impose those requirements, and Congress has not followed up on the sugges-

tion in the ensuing decade and a half. In any event, because Congress "did not focus on jury selection as a possible additional duty for magistrates," *id.* at 932, there is no basis for concluding that Congress would have expected courts to follow the procedures specified in 18 U.S.C. 3401(b), as opposed to the general rule that a defendant speaks through his counsel. Indeed, Congress's failure to act in the wake of *Peretz* suggests Congress chose to follow the latter course.

Congress could well have concluded that the defendant's explicit and personal consent was appropriate if a magistrate judge were to conduct the misdemeanor trial itself and to determine the defendant's fate at sentencing, while believing, if it had considered the question, that such a high level of personal consent was unnecessary if the magistrate judge were simply to preside over one stage of a felony trial—jury selection—after which an Article III judge would take over and conduct the actual trial and impose any sentence and judgment of conviction. Congress would have every reason to draw that distinction in light of counsel's established role in speaking for the defendant on all other matters during jury selection and in light of the numerous tactical and strategic reasons counsel might have preferred that the magistrate judge preside over *voir dire*. See pp. 18-24, *supra*.

Congress also spoke to the issue of consent in the Federal Magistrates Act in Section 636(c)(1), which authorizes a district court, "[u]pon the consent of the parties," to refer to a magistrate judge case-dispositive civil litigation. 28 U.S.C. 636(c)(1); see *Peretz*, 501 U.S. at 933 (observing that a magistrate judge's supervision of entire civil and misdemeanor trials is "comparable in responsibility and importance to presiding over *voir dire*

at a felony trial"). In *Roell* v. *Withrow*, 538 U.S. 580, 584 (2003), the Court rejected the notion that "consent cannot be implied by the conduct of the parties." The Court held that "the better rule is to accept implied consent where, as here, the litigant *or counsel* was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the Magistrate Judge." *Id* at 590 (emphasis added). The Court reasoned that "[i]nferring consent in these circumstances thus checks the risk of gamesmanship by depriving parties of the luxury of waiting for the outcome before denying the magistrate judge's authority." *Ibid.*

That analysis applies with even greater force in this case. Counsel in this case did more than just implicitly consent to the magistrate judge's role in conducting *voir dire*. The magistrate judge specifically asked the parties whether they consented to having her preside over *voir dire*, and petitioner's counsel expressly consented to that procedure. No complaints were heard from petitioner until he was convicted and the case was on appeal. Under these circumstances, the court and the prosecutor were entitled to assume that petitioner had abandoned any objection to allowing the magistrate to conduct *voir dire*.

II. THE COURT OF APPEALS CORRECTLY REVIEWED PETITIONER'S OBJECTION FOR PLAIN ERROR

Even assuming that the trial court below erred in its referral of jury selection to the magistrate absent petitioner's explicit and personal consent, petitioner forfeited that claim of error by failing to object before either the district judge or the magistrate judge. "'No procedural principle is more familiar to this Court than

that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *Olano*, 507 U.S. at 731 (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)); accord *United States* v. *Cotton*, 535 U.S. 625, 631 (2002); *Peretz*, 501 U.S. at 936-937; *United States* v. *Frady*, 456 U.S. 152, 162-163 (1982); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239 (1940). That principle is embodied in Federal Rule of Criminal Procedure 52(b), which provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Petitioner is subject to Rule 52(b) in this case, and petitioner cannot make the necessary showing that it was plain error to permit the magistrate judge to conduct jury selection with defense counsel's express consent.

A. Rule 52(b) Applies To Petitioner's Improper Delegation Claim

1. Petitioner argues that Rule 52(b) does not apply in this case because Federal Rule of Criminal Procedure 51(b) provides that "[i]f a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party." Br. 46. Petitioner claims that Rule 51(b) applies in this case because he was not present at the bench when counsel consented on his behalf, and because the record does not otherwise reflect the defendant's informed consent. Br. 47. He further contends that his *counsel's* opportunity to object is "beside the point" because the nature of the claimed error is that counsel's waiver was ineffective. *Ibid.* Those contentions lack merit.

Petitioner was represented by counsel who, as his agent, spoke for petitioner. The only inquiry is thus whether there was an opportunity for an objection *by the defense*. Here, the magistrate judge explicitly asked the prosecutor and defense counsel if she could assist with jury selection, J.A. 16, thereby plainly giving the parties the "opportunity to object." Fed. R. Crim. P. 51(b). Had counsel for either petitioner or the government *objected* to the magistrate judge's role in supervising jury selection, it would be clear that counsel spoke on behalf of the "party" that counsel represented. *Ibid.* Indeed, in *Gomez* itself, the objection to assigning jury selection to the magistrate judge was made by defense counsel. 490 U.S. at 860-861. There was likewise nothing to stop petitioner's counsel from insisting that the magistrate obtain the defendant's explicit and personal consent. Such a course of action would have cured any claim of error and would have prevented the risk of gamesmanship. *Roell*, 538 U.S. at 590; *United States* v. *Gagnon*, 470 U.S. 522, 529 (1985) (per curiam); *Sykes*, 433 U.S. at 89-90; *Williams*, 425 U.S. at 508 n.3.[8]

2. Petitioner also argues (Br. 49-51) that Rule 52(b) has no application to a claim that a constitutional right

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[8] While represented defendants are not ordinarily expected to address the court, petitioner himself was not deprived of an opportunity to object to magistrate judge's role, assuming he had concerns with that role that were apparently not shared by his counsel. Following counsel's request for the assistance of an interpreter, the magistrate introduced herself on the record. J.A. 16-17; note 1, *supra*. The rule petitioner advocates, moreover, would relieve a defendant of the obligation to object to the magistrate judge's role in jury selection (or to the judge's failure to secure his personal and explicit consent) even where the defendant had discussed the matter with his counsel and specifically directed his counsel to consent to have the magistrate judge preside over *voir dire*.

was violated without an adequate waiver by the defendant. Even assuming that petitioner's *constitutional* rights were violated (but see *Peretz*, 501 U.S. at 936, 937), petitioner's claim of error is nonetheless subject to review only for plain error.

Rule 52(b) applies to *all* claims of error, including a claim of error based on an invalid waiver of a constitutional or statutory right. In *Johnson* v. *United States*, 520 U.S. 461, 466 (1997), this Court rejected the argument that the plain-error rule was inapplicable because the error was asserted was "structural." The Court explained that "the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure." *Ibid.* Rule 52(b), the Court added, "governs direct appeals from judgments of conviction in the federal system," and reflects a balance of the need to redress injustice against the need to encourage timely objections in the first instance. *Ibid.* "Even less appropriate than an unwarranted expansion of the Rule would be the creation out of whole cloth of an exception to it, an exception which we have no authority to make." *Ibid.*; see *Peguero* v. *United States*, 526 U.S. 23, 29 (1999) ("Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions.") (quoting *Bank of N.S.* v. *United States*, 487 U.S. 250, 255 (1988)).

This Court accordingly has held that Rule 52(b) applies even when the nature of the claimed error is that the defendant did not make an informed waiver of his rights. In *United States* v. *Vonn*, 535 U.S. 55 (2002), the Court reviewed for plain error under Rule 52(b) the

claim that a defendant did not adequately waive his rights in pleading guilty because the trial court failed to advise him of his right to counsel at trial as required by Federal Rule of Criminal Procedure 11. The Court rejected the dissenting view of Justice Stevens that it was "perverse" to require "an uninformed defendant to object to deviation from Rule 11 or to establish prejudice arising out of the judge's failure to mention a right that he does not know he has." 535 U.S. at 78-79 (Stevens, J., concurring in part and dissenting in part). The Court responded (*id.* at 73 n.10) that "counsel is obligated to understand the Rule 11 requirements" and that "[i]t is fair to burden the defendant with his lawyer's obligation to do what is reasonably necessary to render the guilty plea effectual and to refrain from trifling with the court." *Ibid.* The Court concluded that "[i]t therefore makes sense to require counsel to call a Rule 11 failing to the court's attention." *Ibid.*[9]

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[9] Petitioner argues (Br. 50 n. 37) that the Court in *United States* v. *Dominguez Benitez*, 542 U.S. 74, 84 n.10 (2004), implied that plain-error review would not apply to a *constitutional* claim that a defendant did not validly waive his rights in pleading guilty. That is not correct. In *Dominguez Benitez*, the Court described the effect on "substantial rights" under Rule 52(b) that a defendant must establish from a Rule 11 error in order to show plain error; *i.e.* "a reasonable probability that, but for the error, he would not have entered the plea." *Id.* at 83. The court then drew a contrast to a claim that the record contained no evidence that a defendant knew of the constitutional rights he was waiving by pleading guilty, stating that it did not suggest that such a "conviction could be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless." *Id.* at 84 n.10. That footnote addressed the showing needed to establish an effect on substantial rights under Rule 52(b) for different types of violations; it did not create an exception to Rule 52(b). Any reading of that footnote for the broader proposition that a claim of an invalid waiver cannot be forfeited would run directly counter to

That analysis applies even with more force here. As discussed, counsel and the petitioner did not merely stay silent as the magistrate judge conducted *voir dire*; petitioner's counsel affirmatively agreed to the magistrate judge's role. J.A. 16. The fair and orderly administration of criminal proceedings required counsel to call any claim of error to the trial court's attention, and petitioner should not now be rewarded with a new trial because the magistrate judge did precisely what was agreed to by counsel.

3. Petitioner further argues that Rule 52(b) does not apply in this case because an objection would have cured any error and thus the only way the error could be reviewed is by raising it for the first time on appeal. Br. 51-54. Petitioner relies on Justice Scalia's dissenting opinion in *Peretz*, 501 U.S. at 953-955, where he concluded:

> By definition, these claims can be advanced *only* by a litigant who will, if ordinary rules are applied, be deemed to have forfeited them: A defendant who objects will not be assigned to the magistrate at all. Thus, if we invariably dismissed claims of this nature on the ground of forfeiture, district courts would *never* know whether the Act authorizes them, with the defendant's consent, to refer felony *voir dire* to a magistrate, and, if so, what form the consent must take.

Id. at 954-555. Justice Scalia's dissenting opinion makes clear, however, that a defendant who fails to raise at trial his objection to having a magistrate judge preside over *voir dire* "plainly forfeit[s] his *right* to advance his

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this Court's explicit refusal to create exceptions to Rule 52(b) in *Johnson*.

current challenges to the Magistrate's role." *Id.* at 953. In any event, the very purpose of the contemporaneous objection rule is to require litigants to bring the error to the court's attention in the first place so that the error can be cured and the issue removed as a basis for appeal. Thus, Rule 52(b) applies, for instance, when a defendant fails to object to presence of alternate jurors during jury deliberations in violation of Federal Rule of Criminal Procedure 24(c), *Olano*, *supra*, or when he fails to object to an error under Rule 11, *Vonn*, *supra*, even though had the defendant objected the court presumably would have cured the error on the spot.

More recent decisions of this Court have also refined the standard for plain-error review, as well as addressed the concerns expressed in Justice Scalia's analysis. A reviewing court may not correct an error under Rule 52(b) until *after* the court is satisfied that all of the requirements of the Rule have been shown. *Johnson*, 520 U.S. at 466-467; *Olano*, 507 U.S. at 732. Courts also need not simply reach a blanket conclusion of plain error in a way that would preclude the development of the law. There is no rigid "order-of-battle rule" that dictates the order in which the four factors should be addressed. Cf. *Morse* v. *Frederick*, 127 S. Ct. 2618, 2641 (2007) (Breyer, J. concurring in the judgment in part and dissenting in part). Courts may flesh out the law in addressing the first component of plain-error review, which asks whether there was error, *i.e.*, whether there was "[d]eviation from a legal rule" and whether "the rule has been waived." *Olano*, 507 U.S. at 732-733. Thus, the court of appeals in this case applied Rule 52(b) and reached petitioner's underlying claim of error, concluding that "there is no error here; the right to have an

Article III judge conduct voir dire is one that may be waived through the consent of counsel." J.A. 33.

4. Petitioner argues that applying Rule 52(b) would serve no legitimate governmental interest and would anomalously impose a stricter error-preservation rule on federal defendants than that imposed on similarly situated state defendants. Br. 54-58. But Rule 52(b) obviously serves the government's legitimate interest in not upsetting a criminal conviction, with all the attendant societal costs (see, *e.g.*, *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986)), when an objection could have cured the error or, as here, when the court followed a procedure agreed to by defense counsel. In any event, this Court in *Johnson* has already rejected the suggestion that this Court's review of appeals from state court judgments, either by direct or collateral review, should dictate the application of Rule 52(b). The Court concluded "it is [Rule 52(b)] which by its terms governs direct appeals from judgments of conviction in the federal system, and therefore governs this case." 520 U.S. at 466.

B. Any Error In Having The Magistrate Judge Preside Over *Voir Dire* Does Not Satisfy The Requirements For Plain Error Under Rule 52(b)

Under Rule 52(b), a court of appeals is required to reject a forfeited claim unless the defendant makes four distinct showings. As this Court has explained:

> [B]efore an appellate court can correct an error not raised at trial, there must be (1) "error," (2) that is "plain," and (3) that "affect[s] substantial rights." If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error "'seriously affect[s] the

fairness, integrity or public reputation of judicial proceedings.'"

Johnson, 520 U.S. at 466-467 (quoting *Olano*, 507 U.S. at 732). Petitioner's claim does not satisfy those requirements because, even if the magistrate judge erred in presiding over *voir dire* with defense counsel's consent, petitioner has not shown that such error was plain, affected petitioner's substantial rights, or seriously affected the fairness, integrity or public reputation of judicial proceedings.

1. Any error in allowing the magistrate judge to supervise* voir dire *was not "plain" within the meaning of Rule 52(b)

For the reasons previously given, the United States does not believe that there is either constitutional or statutory error when a magistrate judge conducts *voir dire* with defense counsel's consent, even if the defendant does not explicitly and personally consent to the magistrate judge's role. But if the Court concludes to the contrary, such an error was not "plain" under Rule 52(b). For an error to be "plain," it must be clear and "settled * * * at the time of appellate consideration." *Johnson*, 520 U.S. at 468; *Olano*, 507 U.S. at 734 ("'Plain' is synonymous with 'clear,' or, equivalently, 'obvious.'") (quoting *United States* v. *Young*, 470 U.S. 1, 17 n.14 (1985)).[10]

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[10] Petitioner does not argue that an error can *become* "plain" when this Court for the first time reaches the merits of a defaulted claim and finds error. Nor would such an argument be valid, as there would be no meaningful independent requirement that the error be "plain" if the defendant need only in this Court establish an error involving an unsettled issue.

Petitioner argues that the error was plain in light of *Gomez* and *Peretz* and other precedents indicating that a litigant must personally waive basic personal rights. Br. 58-59. No such personal consent, however, was required in *Peretz*. That decision also specifically rejected the notion that a defendant who sits silently as the magistrate judge conducts *voir dire* has any statutory or constitutional rights, and *Peretz* likewise repeatedly endorsed the view of the lower courts that had limited *Gomez* to the situation where the defendant actually voices an objection to the magistrate judge's role. See pp. 14-17, *supra*. Furthermore, under this Court's precedents, courts are entitled to presume that counsel speaks on the defendant's behalf when making strategic or tactical decisions during the course of a criminal proceeding. See pp. 19-21, *supra*,

Far from any error being obvious, the overwhelming consensus of authority at the time of petitioner's trial as well as at the time of his appeal was that delegation of *voir dire* to a magistrate judge did not depend on obtaining a defendant's personal, informed consent—a fact that may explain why defense counsel here consented to the magistrate judge's role on behalf of his client. Based on *Peretz*, four courts of appeals had concluded that a defendant need not give any form of affirmative consent to the supervision of *voir dire* by a magistrate judge. See *United States* v. *Desir*, 273 F.3d 39, 44 (1st Cir. 2001) (holding that "affirmative consent is not required" and that "a magistrate may conduct jury selection unless the defendant or his attorney registers an objection"); *Clark* v. *Poulton*, 963 F.2d 1361, 1366 n.5 (10th Cir.) ("*Peretz* permits referral to the magistrate of felony trial jury voir dire where the parties consent *or* where the defendant raises no objection."), cert. denied,

506 U.S. 1014 (1992); *United States* v. *Arnoldt*, 947 F.2d 1120, 1123 (4th Cir. 1991) (under *Peretz*, the failure to object to the delegation of authority to the magistrate waives any resulting constitutional error), cert. denied, 503 U.S. 983 (1992); *United States* v. *Jones*, 938 F.2d 737, 744 (7th Cir. 1991) (holding referral of jury selection to magistrate judge was not plain error and that "our outcome is the same" whether the defendant "simply did not object or in fact consented to this procedure").

Two other courts of appeals had required affirmative consent to a delegation of *voir dire* to a magistrate judge, but also had indicated that a statement by counsel is sufficient. The Eighth Circuit, in a civil case, *Harris* v. *Folk Constr. Co.*, 138 F.3d 365 (1998), reiterated its "consistent[]" holding that "[s]ection 636(c) requires a clear and unambiguous statement in the record of the affected parties' consent." *Id.* at 369 (quoting *Reiter* v. *Honeywell, Inc.*, 104 F.3d 1071, 1073 (8th Cir. 1997)). It acknowledged, however, that the statements of counsel such as those at issue in *Peretz* can serve as a sufficiently "clear and unambiguous statement." *Ibid.* (distinguishing *Peretz* on the ground that in "the instant [case] * * * there was no discernible statement of consent by the litigants"); see *Reiter*, 104 F.3d at 1073 ("In *Peretz v. United States*, the parties expressly consented to the magistrate judge's conducting of the voir dire."). Similarly, the Ninth Circuit had merely held, in other contexts, that "'consent by failure to object' is insufficient to clothe the magistrate with § 636(c) powers," *United States* v. *Gomez-Lepe*, 207 F.3d 623, 631 (2000) (quoting *Nasca* v. *Peoplesoft*, 160 F.3d 578, 579 (9th Cir. 1998)); it had not held, however, that consent by counsel was insufficient absent the defendant's explicit and per-

sonal consent. Since then, albeit shortly after the court of appeals' decision, the Ninth Circuit held that a magistrate judge has the authority to preside over closing argument with consent of counsel alone. *Gamba*, 483 F.3d at 948.

Only the Eleventh Circuit had held that the magistrate judge could not conduct *voir dire* without the defendant's explicit and personal consent on the record. *United States* v. *Maragh*, 189 F.3d 1315, 1318 (1999) (per curiam). Given the near consensus of opinion in the lower courts that counsel's consent was sufficient, the delegation to the magistrate judge in this case to conduct *voir dire* did not constitute an error that was "plain" for purposes of Rule 52(b).

2. Any error in the failure to obtain petitioner's explicit and personal consent did not affect petitioner's substantial rights

a. An effect on substantial rights under the plain-error rule has the same meaning that it has under the harmless-error rule (Fed. R. Crim. P. 52(a)), although the defendant has the burden of showing an effect on substantial rights under the plain-error rule, whereas the government has the burden of proof under the harmless-error rule. *United States* v. *Dominguez Benitez*, 542 U.S. 74, 81-82 (2004); *Vonn*, 535 U.S. at 62-63; *Olano*, 507 U.S. at 734. This Court's precedents establish that the proper test for harmless error under Rule 52(a) is generally whether the error affected the "outcome" or "result" of the particular proceeding at issue. See, *e.g.*, *Dominguez Benitez*, 542 U.S. at 82-83; *Olano*, 507 U.S. at 734. This Court in *Gomez* held that "harmless-error analysis does not apply in a felony case in which, despite the defendant's objection and without

any meaningful review by a district judge, an officer exceeds his jurisdiction by selecting a jury." 490 U.S. at 876.

To the extent that the Court equates error under *Gomez* with any error it finds in this case, petitioner would establish an effect on "substantial rights" without more. But the error in *Gomez* differs critically from the alleged error in this case. In *Gomez*, the defense objected to the magistrate judge's conduct of jury selection. In this case, defense counsel welcomed the magistrate judge's role, and petitioner's personal views about the magistrate judge's conduct of jury selection are, on this record, unknown. It would be inappropriate to presume that a defendant in that situation would object to a magistrate judge's participation if the court asked him for his views. To the contrary, the most likely scenario is that a defendant would defer to his counsel's strategic and tactical decision to have the magistrate judge conduct jury selection and would give explicit consent if asked. That is because counsel most likely consents to the magistrate judge's role only because of a belief that such consent would advance the defendant's interests in securing a jury favorable to the defense, and because the decision about the presiding officer falls clearly within a lawyer's domain. Accordingly, it is likely that the alleged error in this case did not change the identity of the judicial officer who presided over jury selection.

Because of the distinction between *Gomez* error (where counsel affirmatively preferred a different judicial officer to conduct jury selection, and his client presumably agreed) and the alleged error here (where counsel affirmatively preferred the magistrate judge and nothing suggests that his client would have disagreed), it would be appropriate to make an effect on

substantial rights turn on whether the defendant can establish a sufficient likelihood that he would not have given personal and explicit consent to the magistrate judge's participation. That standard would be analogous to the showing on plain-error review that a defendant must make to void his guilty plea based on Rule 11 error. Such a defendant must "show a reasonable probability that, but for the error, he would not have entered the plea." *Dominguez Benitez*, 542 U.S. at 83; see *id.* at 83 n.9 (noting that a "reasonable[] probability" does not require a showing "by a preponderance of the evidence that but for error things would have been different").

It is certainly true that, on plain-error review, a defendant would rarely, if ever, be able to meet that test, because the defendant could not enlarge the record to establish facts from which it could be inferred that the defendant may not have given his consent, and the record is not likely to contain evidence suggesting that the defendant would have disputed his lawyer's choice. But a defendant should be able to succeed on plain-error review of a claim like petitioner's only in exceptional circumstances, given the presumption that counsel acts in his client's interest and the unlikelihood that a criminal defendant would harbor a preference for a judicial officer to preside over jury selection that contradicted his counsel's advice. Cf. *Dominguez Benitez*, 542 U.S. at 83 n.9 (acknowledging that, on plain-error review, relief in the form of setting aside a guilty plea for Rule 11 error "will be difficult to get, *as it should be*") (emphasis added).[11]

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[11] As noted, a defendant could raise a claim of ineffective assistance of counsel on collateral review under 28 U.S.C. 2255, in which case he would need to show both deficient performance in counsel's failure to require the court to secure the defendant's personal and explicit con-

In this case, petitioner has not argued that there is any reasonable probability that he would have withheld personal and explicit consent to the magistrate judge's role, if the court had asked him. Nor is there anything in the record that suggests that petitioner would have made such a choice. Although courts do not presume a knowing waiver of constitutional rights in a guilty plea from a "silent record," *Boykin*, 395 U.S. at 242 (quoting *Carnley* v. *Cochran*, 369 U.S. 506, 516 (1962)), the issue at this stage of plain-error analysis is not whether petitioner waived his assumed right to give personal consent to the magistrate judge's role. Rather, it is whether he can establish that the court's failure to inquire of him had an effect on his substantial rights. Petitioner has not attempted to make that showing.

b. The alleged error in this case cannot be equated with errors such as the constitutionally invalid waiver of a jury trial or the entry of an unknowing and unintelligent guilty plea. Such defects affect substantial rights

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sent and prejudice. *Strickland*, *supra*. In that setting, a defendant could develop the record to establish prejudice, *i.e.*, that there is a reasonable probability that he would have withheld consent. That approach would be consistent with other claimed ineffectiveness violations involving deprivation of a defendant's choice on how to exercise his rights. See *Hill* v. *Lockhart*, 474 US. 52, 59 (1985) (where a defendant alleges ineffectiveness based on counsel's errors in connection with a guilty plea, to show prejudice a defendant must establish a reasonable probability that, but for counsel's error, the defendant "would not have pleaded guilty and would have insisted on going to trial"); *Flores-Ortega*, 528 U.S. at 484 (where a defendant alleges ineffectiveness based on counsel's errors in consulting with a defendant concerning whether to appeal, "to show prejudice * * * a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed").

even if, for example, the record overwhelmingly makes clear that the defendant would have pleaded guilty if he had been fully aware of his rights. *Dominguez Benitez*, 542 U.S. at 84 n.10; see *Miller* v. *Dormire*, 310 F.3d 600, 604 (8th Cir. 2002) (attorney's waiver of jury trial on behalf of his client is structural Sixth Amendment error). This case presents a different issue. In light of *Peretz*, no constitutional error can be found when a magistrate judge presides over jury selection unless the defense has made an "objection." 501 U.S. at 936; pp. 14-17, *supra*. And a *statutory* right to give personal and explicit consent to a magistrate judge's presiding at jury selection would not be equivalent to the constitutional right to a trial (or jury trial) absent a knowing and intelligent waiver.

Even if the Court found constitutional error here, in at least two significant respects, the error would differ from the accused's right to have a trial and right to a jury. First, those rights pervasively affect the outcome of a criminal case, either by changing the decision maker or by eliminating the contest over guilt. The right to have an Article III judge preside over *voir dire* has a far more modest function. Second, a defendant is likely to have an independent opinion, which may differ from his counsel, on whether to have a judge rather than a jury decide his guilt, or to concede guilt altogether. In contrast, he is much less likely to differ with counsel on the more technical (and less consequential) question of which judicial officer should preside at jury selection. Accordingly, the proper test for establishing an effect on substantial rights in this context should focus, as in *Dominguez Benitez*, on the likelihood that a defendant would have proceeded differently if the error had not been committed.

c. Ultimately, however, this Court need not decide whether a defendant in petitioner's position must show that he would not have consented to the magistrate judge's role in order to establish an effect on substantial rights. Even if an effect on substantial rights is established merely from the error itself, petitioner could not meet the fourth requirement for plain-error relief, as discussed below. See *Cotton*, 535 U.S. at 632-633 (declining to resolve whether omission from the indictment of a fact that increases a statutory maximum sentence affected substantial rights because "even assuming respondents' substantial rights were affected, the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings"); *Johnson*, 520 U.S. at 469 (declining to resolve whether omission of an offense element from a jury instruction affected substantial rights because the error did not meet the fourth requirement of plain-error review).

3. Any error in having the magistrate judge conduct voir dire *did not seriously affect the fairness, integrity, or public reputation of judicial proceedings*

Finally, reversal of petitioner's conviction is clearly unwarranted under the fourth component of the plain-error rule. Petitioner has made no claim that the result of his trial would have been different if the magistrate judge had not presided over *voir dire*. He likewise makes no claim that he would have voiced an objection, contrary to his counsel's wishes, to the magistrate judge's role had the court *sua sponte* sought his explicit and personal consent.

As the record makes clear, moreover, jury selection in this case proceeded without incident or controversy. Both parties were allowed to make statements to the

venire members and to frame and ask their own series of questions. The prospective jurors that were excused for cause were excused either at defense counsel's request or without objection by defense counsel. Defense counsel raised neither objections to any rulings by the magistrate judge during *voir dire* nor expressed dissatisfaction at any time with the jury that was ultimately chosen. And the only error alleged is that the magistrate judge conducted *voir dire* with consent of defense counsel rather than the petitioner personally—a procedure that the majority of court of appeals had held was in compliance with this Court's decision in *Peretz*. Those circumstances hardly rise to a "miscarriage of justice" that would dictate relief notwithstanding petitioner's procedural default of his claim. *Olano*, 507 U.S. at 736 (quoting *Young*, 470 U.S. at 15).[12]

Quite to the contrary, to grant relief in this case would seriously detract from "the fairness, integrity [and] public reputation of judicial proceedings." *Olano*, 507 U.S. at 736. Petitioner's claim for relief strikes at the core of the contemporaneous-objection rule. That rule not only promotes judicial economy by allowing the court to correct any claimed error. *Luce* v. *United States*, 469 U.S. 38, 41-42 (1984); *Sykes*, 433 U.S. at 90. It also guards against the "risk of gamesmanship by

[12] The National Association of Criminal Defense Lawyers and the National Association of Federal Defenders argue, without citation to the record, that defense counsel was coerced to consenting to have the magistrate judge preside over *voir dire* because an objection "would have significantly delayed the proceedings and inconvenienced the district judge, the magistrate judge, and the prospective jurors." NACDL Amicus Br. 32. There is no basis for concluding that the trial court was not fully prepared to conduct *voir dire* had counsel objected. Nor has petitioner made any claim that his counsel felt coerced in consenting to the magistrate judge's role.

depriving parties of the luxury of waiting for the outcome before denying the magistrate judge's authority." *Roell*, 538 U.S. at 590; accord *Vonn*, 535 U.S. at 73 n.10; *Williams*, 425 U.S. at 508.

As discussed, petitioner utterly failed to give the trial court the opportunity to resolve any objection to the magistrate judge, who presided over jury selection only after the judge obtained the express consent of petitioner's counsel. Allowing defense counsel to agree to a particular procedure and then seek reversal because the court carried out that agreement is inconsistent with basic rules of fairness and "sound considerations of judicial economy." *Thomas* v. *Arn*, 474 U.S. 140, 147 (1985). To recognize such claims would provide an incentive to inject error into the proceedings in the hope of creating an issue that could be raised on appeal in the event of a conviction. See *Henry* v. *Mississippi*, 379 U.S. 443, 451 (1965). And such a rule would give defendants the benefit of both worlds: the procedure the defense prefers at the trial level, and a potentially winning argument on appeal if the case turns out badly.

Petitioner asserts that the "record disposes of any suggestion" that counsel "intentionally" created an error to raise on appeal because counsel did not invite the error and it is only rarely the case that counsel would consent outside the presence of his client. Br. 48 n.36. Petitioner offers no empirical proof to support the latter assertion and both assertions miss the point in any event. A party may not engage in "sandbagging" by "suggesting *or permitting*, for strategic reasons, that the trial court pursue a certain course, and later * * * claiming that the course followed was reversible error." *Freytag* v. *Commissioner*, 501 U.S. 868, 895 (1991) (Scalia, J., concurring in part and concurring in the

judgment) (emphasis added). The rule petitioner advocates also would apply even where counsel knows the court is committing error by not securing the defendant's explicit and personal consent. And petitioner's rule would apply in other cases even where the defendant affirmatively preferred that the magistrate judge preside over *voir dire* but the defendant did not express on the record his explicit and personal consent. That is not a rule that would promote fairness, integrity, or public confidence in criminal proceedings.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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